Sigma Elevator (M) Sdn Bhd v Fadason Holdings Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-459 OF 2011
VT SINGHAM J
15 DECEMBER 2011

Contract — Agreement — Stakeholding — Duties of stakeholder — Solicitor in breach of duty as stakeholder of monies in contract transaction — Whether stakeholder in position of trustee — Whether solicitor could claim lien over stakeholder sums in relation to unpaid fees — Whether stakeholder legally obliged to release stakeholder money upon instruction by client

Contract — Breach — Defence — Contracting party depositing with stakeholder monies due under contract — Whether amounting to a valid defence to a claim for monies due under contract

Legal Profession — Liability as fiduciary — Stakeholding — Solicitor in breach of duty as stakeholder of monies in contract transaction — Whether stakeholder in position of trustee — Whether solicitor could claim lien over stakeholder sums in relation to unpaid fees — Whether stakeholder legally obliged to release stakeholder money upon instruction by client

The plaintiff was the subcontractor of the first defendant for a project which involved installation of lifts ('the project'). The second defendant was the first defendant's solicitors at that material time. As consideration for the work carried out by the plaintiff, the first defendant agreed to deposit the balance contract sum of RM495,000 ('the stakeholder sum') with the second defendant as stakeholder. The second defendant issued to the plaintiff an undertaking to release to the plaintiff the stakeholder sum upon receiving from the plaintiff the relevant 'Perakuan Kelayakan' from 'Jabatan Keselamatan & Kesihatan Pekerjaan'. In reliance of the letter of undertaking, the plaintiff had continued and completed the work. The plaintiff and the first defendant then reached an agreement whereby the stakeholder sum will be released to the plaintiff on the plaintiff's undertaking to obtain 'Perakuan Kelayakan' from JKKP and not upon the plaintiff having had obtained the 'Perakuan Kelayakan'. Accordingly, the first defendant instructed the second defendant to release the stakeholder sum to the plaintiff. The second defendant refused to release the stakeholder sum on the ground that the second defendant was exercising his right of solicitor lien on the stakeholder sum pursuant to r 17 of the Solicitors' Account

Rules 1990 ('r 17') purportedly on the grounds that the first defendant owed monies to the second defendant (arising from unrelated transaction). Hence, the plaintiff filed this suit against the defendants for the entire sum of RM495,000. The parties agreed that the plaintiff's application for summary judgment be disposed of under O 14A of the Rules of the High Court 1980 on the following questions of law: (i) since the stakeholder sum was held in trust by the second defendant for the plaintiff, was the second defendant legally obliged to release the said money to the plaintiff upon instructions by the first defendant?; (ii) whether the instructions given by the first defendant to the second defendant to release the said money to the plaintiff was valid?; and (iii) as the stakeholder sum was held in trust by the second defendant for the plaintiff, did the second defendant have a lien on the said money and was legally entitled not to release the said money to the plaintiff pending the determination of the second defendant's fees.

Held, ordering the second defendant to pay the stakeholder sum to the plaintiff:

(1) As the stakeholder sum was held in trust by the second defendant for the benefit of the plaintiff, the second defendant was legally obliged to release the said sum to the plaintiff upon instructions given by the first defendant. The second defendant had no business to enter into the dispute or disagreement or compromise or variation of the agreement in respect of the works and the terms of the payment of the contract of works which was a matter entirely between the first defendant and the plaintiff (see paras 19(b) & 20(a)).

(2) The second defendant who had given the undertaking to the plaintiff to hold the stakeholder sum in trust for the plaintiff was not permitted to resile from the undertaking by raising collateral issues with the view to delay or deny the plaintiff of the right and entitlement of the stakeholder sum. The second defendant's contention and reasons for not releasing the stakeholder sum to the plaintiff was too vague, inconsistent and contrary to the undertaking he had given to the plaintiff (see paras 22–23).

(3) The second defendant's contention that the stakeholder sum was deemed to be client's money and was capable of being subjected to the second defendant solicitor's lien pursuant to r 17 was an afterthought defence, and on the facts in the present case, it had no basis in law and in fact (see para 20(b)).

(4) The second defendant could not unilaterally impose a new set of terms and conditions to the said letter of undertaking which was not intended or instructed by the first defendant (see para 20(d)).

(5) When a solicitor receives trust money with the express notice of the trust, he is, in equity, as in the present case, and coupled with his undertaking,

in the position of an express trustee. It was the duty of the court to enforce the obligation as provided in the letter of undertaking by the second defendant unless it could be shown that the payment of the stakeholder sum to the plaintiff would be purely contrary to the real justice of the case which was not the case (see para 30).

(6) As for the first defendant, there was a valid defence recognised in law to oppose the plaintiff's claim against the first defendant. Therefore, the first defendant was absolved from liability to the plaintiff as the first defendant had already deposited the money owing to the plaintiff with the second defendant for payment to the plaintiff and it was clearly reflected in the said letter of undertaking given by the second defendant (see para 33).

[Bahasa Malaysia summary

Plaintif adalah subkontraktor kepada defendan pertama untuk projek yang melibatkan pemasangan lif-lif ('projek tersebut'). Defendan kedua merupakan peguamcara defendan pertama pada masa matan tersebut. Sebagai balasan untuk kerja yang dilakukan oleh plaintif, defendan pertama bersetuju untuk mendepositkan baki jumlah kontrak sebanyak RM495,000 ('jumlah wang pemegang amanah') dengan defendan kedua sebagai pemegang amanah. Defendan kedua telah memberikan kepada plaintif akujanji untuk melepaskan kepada plaintif jumlah wang pemegang amanah setelah menerima daripada plaintif 'Perakuan Kelayakan' relevan daripada 'Jabatan Keselamatan & Kesihatan Pekerjaan'. Berdasarkan kebergantungan kepada surat akujanji itu, plaintif telah meneruskan dan menyelesaikan kerja tersebut. Plaintif dan defendan pertama kemudian telah mencapai persetujuan yang mana jumlah wang pemegang amanah akan dilepaskan kepada plaintif atas akujanji plaintif untuk memperoleh 'Perakuan Kelayakan' daripada JKKP dan bukan apabila plaintif telah memperoleh 'Perakuan Kelayakan'. Sewajarnya, defendan pertama mengarahkan defendan kedua untuk melepaskan jumlah wang pemegang amanah kepada plaintif. Defendan kedua enggan melepaskan jumlah wang pemegang amanah atas alasan bahawa defendan kedua telah melaksanakan haknya sebagai peguam cara lien atas jumlah wang pemegang amanah menurut k 17 Kaedah-Kaedah Akaun Peguamcara 1990 ('k 17') yang dikatakan atas alasan bahawa defendan pertama terhutang wang dengan defendan kedua (yang timbul daripada transaksi yang tidak berkaitan). Justeru, plaintif telah memfailkan guaman terhadap defendan-defendan untuk keseluruhan jumlah RM495,000. Pihak-pihak bersetuju bahawa permohonan plaintif untuk penghakiman terus dilupuskan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 berdasarkan persoalan-persoalan perundangan berikut: (i) oleh kerana jumlah wang pemegang amanah dipegang atas amanah oleh defendan kedua untuk plaintif, adakah defendan kedua diwajibkan di sisi undang-undang untuk melepaskan wang tersebut kepada plaintif atas arahan-arahan oleh defendan pertama?; (ii) sama ada arahan-arahan yang

diberikan oleh defendan pertama kepada defendan kedua untuk melepaskan wang tersebut kepada plaintif adalah sah?; dan (iii) oleh kerana jumlah wang pemegang amanah dipegang atas amanah oleh defendan kedua untuk plaintif, adakah defendan kedua mempunyai lien ke atas wang tersebut dan berhak di sisi undang-undang untuk tidak melepaskan wang tersebut kepada plaintif sementara menunggu penentuan fi defendan kedua.

Diputuskan, memerintahkan defendan kedua membayar wang pemegang amanah kepada plaintif:

(1) Oleh kerana jumlah wang pemegang amanah dipegang atas amanah oleh defendan kedua demi kebaikan plaintif, defendan kedua diwajibkan di sisi undang-undang untuk melepaskan wang tersebut kepada plaintif atas arahan-arahan yang diberikan oleh defendan pertama. Defendan kedua tidak patut campur tangan dalam pertikaian atau perselisihan atau kompromi atau perubahan perjanjian berkaitan kerja-kerja dan terma-terma bayaran kontrak kerja-kerja itu yang mana keseluruhannya adalah hal perkara antara defendan pertama dan plaintif (lihat perenggan 19(b) & 20(a)).

(2) Defendan kedua yang telah memberikan akujanji kepada plaintif untuk memutuskan jumlah wang pemegang amanah atas amanah untuk plaintif tidak dibenarkan untuk mengelak daripada akujanji itu dengan menimbulkan isu-isu kolateral dengan tujuan untuk menangguhkan atau menafikan hak dan kelayakan plaintif terhadap jumlah wang pemegang amanah itu. Hujah dan alasan defendan kedua kerana tidak melepaskan jumlah wang pemegang amanah kepada plaintif adalah tidak jelas, tidak konsisten dan bertentangan dengan akujanji yang diberikannya kepada plaintif (lihat perenggan 22–23).

(3) Hujah defendan kedua bahawa jumlah wang pemegang amanah dianggap wang pelanggan dan boleh tertakluk kepada lien peguam cara defendan kedua menurut k 17 adalah suatu pembelaan yang difikirkan kemudian, dan berdasarkan fakta kes ini, ia tidak mempunyai asas dari segi undang-undang dan fakta (lihat perenggan 20(b)).

(4) Defendan kedua tidak boleh secara unilateral dikenakan set terma-terma dan syarat-syarat baru kepada surat akujanji tersebut yang tidak dimaksudkan atau diarahkan oleh defendan pertama (lihat perenggan 20(d)).

(5) Apabila peguam cara menerima wang amanah dengan notis nyata amanah itu, dalam ekuiti sebagaimana dalam kes ini dan dengan akujanjinya, dia dalam kedudukan sebagai pemegang amanah nyata. Adalah kewajipan mahkamah untuk menguatkuasakan tanggungjawab sebagaimana diperuntukkan dalam surat akujanji oleh defendan kedua kecuali boleh ditunjukkan bahawa bayaran jumlah wang pemegang

amanah kepada plaintif jelas bertentangan dengan keadilan sebenar kes yang mana tidak begitu dalam kes ini (lihat perenggan 30).

(6) Berhubung defendan pertama, terdapat pembelaan sah yang diiktiraf dari segi undang-undang untuk menentang tuntutan plaintif terhadap defendan pertama. Oleh itu, defendan pertama telah dibebaskan daripada liabiliti terhadap plaintif kerana defendan pertama telah pun mendepositkan wang yang terhutang kepada plaintif dengan defendan kedua untuk bayaran kepada plaintif dan ia jelas dinyatakan dalam surat akujanji tersebut yang diberikan oleh defendan kedua (lihat perenggan 33).]

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 WLR 565, CA (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] 1 All ER 142, HL (refd)

Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor; Dato' Au Development Sdn Bhd v Malayan United Finance Bhd & Anor [1989] 3 MLJ 434; [1989] 1 CLJ (Rep) 460, HC (refd)

Dickson, In Re [1990] 2 Ch 561, Ch D (refd)

Gasing Heights Sdn Bhd v Aloyah bte Abdul Rahman [1996] 3 MLJ 259, HC (refd)

Koh Yen Bee v American International Assurance Co Ltd [2000] 7 MLJ 278; [2000] 3 CLJ 28, HC (refd)

Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1990] 1 MLJ 445, HC (refd)

Madam Packiam Ramalingam v Badan Peguam Malaysia [2000] 1 MLJ 151; [1999] Part 7 Case 12, HC (refd)

Moloney v Hardy (1970) 216 EG 1582 (refd)

Nasir Kenzin & Tan v Elegant Group Sdn Bhd [2008] MLJU 664; [2009] 1 CLJ 47, CA (refd)

Peninsular Concord Sdn Bhd v Datuk M Kayveas & Anor (both practicing as advocate and solicitor under the name and style of Messrs Blanche Kayveas & Co) [2011] 2 MLJ 534; [2011] 7 CLJ 978, HC (refd)

Rockeagle Ltd v Alsop Wilkinson (a firm) [1992] Ch 47, CA (refd)

Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah [2009] 1 MLJ 794; [2009] 1 CLJ 872, FC (refd)

Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116; [1987] CLJ (Rep) 400, SC (refd)

Vije & Co v Co-Operative Central Bank Ltd [1991] 3 MLJ 432; [1991] 4 CLJ (Rep) 188, HC (refd)

Legislation referred to

Companies Act 1965
Evidence Act 1950 s 115
Rules of the High Court 1980 O 14, O 14A, O 92 r 4
Solicitors' Account Rules 1990 rr 2, 17

Tan May Tze (Shui Tai) for the plaintiff.
Mohan Kumaran (Tajul Arafat & Associates) for the first defendant.
S Jayanthi (RK Nandy & Associates) for the second defendant.

VT Singham J:

[1] By the statement of claim dated 1 June 2011 (encl 2), the plaintiff has pleaded, briefly and, inter alia, as follows:

(a) the plaintiff is the subcontractor of the first defendant for a project known as 'Kerja-kerja Tambahan Untuk Cadangan Pembangunan 10 Tingkat Kedai/ Pejabat/ Service Apartment di atas Sebahagian Lot 9016 dan 9017, Mukim Batu, Kuala Lumpur Untuk Fadason Holdings Sdn Bhd ('the project');

(b) the second defendant was the first defendant's solicitors at that material time;

(c) pursuant to the first defendant's letter dated 19 January 2010 ('the appointment letter'), the plaintiff had upon the first defendant's request, agreed to continue with the installation of lifts work under the project ('the work');

(d) in consideration of the plaintiff agreeing to continue with the work for the first defendant for the sum of RM695,000 ('contract sum'), the first defendant had paid the plaintiff a sum of RM200,000 being the initial payment of the plaintiff's work ('the initial payment');

(e) it is, inter alia, a term of the appointment letter dated 19 January 2010 that the first defendant is to deposit the balance contract sum of RM495,000 ('the stakeholder sum') with the second defendant as stakeholder and the second defendant is to issue to the plaintiff an revocable undertaking to release to the plaintiff the stakeholder sum upon the second defendant receiving and/or the first defendant receiving from the plaintiff the relevant 'Perakuan Kelayakan' from 'Jabatan Keselamatan & Kesihatan Pekerjaan'.

(f) as the terms of the first letter of undertaking is not in accordance with the terms in the letter of appointment, the plaintiff put a stop order to the work pending the issuance of a revised letter of undertaking from the second defendant.

(g) in accordance with the letter of appointment dated 19 January 2010:

(i) the first defendant *had deposited the stakeholder sum* with the second defendant;

(ii) *the second defendant had then issued* a letter of undertaking dated 10 February 2010 to *the plaintiff and undertook to pay the plaintiff the stakeholder sum upon the first defendant's written instructions to the second defendant* for the works undertaken by the plaintiff for the first defendant ('the first letter of undertaking'). (Emphasis added.)

(h) *the second defendant* had then *issued a revised letter of undertaking dated 11 May 2010* (second letter of undertaking) *to the plaintiff confirming as follows*:

(i) the second defendant was in receipt of the stakeholder sum;

(ii) *the second defendant irrevocably undertakes to release the stakeholder sum to the plaintiff upon the second defendant's receipt from the first defendant the relevant 'Perakuan Kelayakan'* from 'Jabatan Keselamatan & Kesihatan Pekerjaan' ('JKKP'). (Emphasis added.)

(i) *in consideration of and in reliance of the second letter of undertaking, the plaintiff had continued and completed the work*. What remains is merely to conduct the testing and commissioning of the installed lifts and the application for the 'Perakuan Kelayakan' from JKKP (Emphasis added.);

(j) on or about 18 April 2011, the plaintiff and the first defendant had reached an agreement whereby the stakeholder sum will be released to the plaintiff on the plaintiff's undertaking to obtain 'Perakuan Kelayakan' from JKKP and not upon the plaintiff having had obtained the 'Perakuan Kelayakan';

(k) *accordingly, the first defendant had on 18 April 2011 instructed the second defendant to release the stakeholder sum to the plaintiff* (Emphasis added.);

(l) *the second defendant refused to release the stakeholder sum on the ground that the second defendant is exercising his right of solicitor lien on the stakeholder sum* pursuant to Rule l7 of the Solicitors' Account Rules 1990 purportedly on the grounds that the first defendant owes monies to the second defendant (arising from unrelated transaction) (Emphasis added.);

(m) the plaintiff had on 29 April 2011 and 6 May 2011 through their solicitors, Messrs Shui Tai demanded the second defendant to release the stakeholder sum to the plaintiff;

(n) the first defendant again on 11 May 2011 through their solicitors, Messrs Tajul Arafat & Associates instructed the second defendant to release the stakeholder sum to the plaintiff;

(o) despite the demands, the second defendant has still refused to release the stakeholder sum to the plaintiff; and

(p) as such, the plaintiff has filed this suit against the defendants for the entire sum of RM495,000.

[2] By statement of defence dated 20 June 2011 (encl 8), the first defendant has pleaded, briefly and, inter alia, as follows:

(a) On 10 May 2010, the first defendant has furnished the second defendant a stakeholder sum of RM495,000 *to be held as a trust for the plaintiff. The stakeholder sum must be released by the second defendant to the plaintiff upon the instruction of the first defendant*. (Emphasis added.)

(b) *By letter dated 18 April 2011, the first defendant has instructed the second defendant to release the said stakeholder sum to the plaintiff but the second defendant has failed, and/or neglected to do so*. (Emphasis added.)

(c) By letter dated 11 May 2011, the first defendant through his solicitor, Messrs Tajul Arafat & Associates has instructed the second defendant to release the said stakeholder sum and further demanded the second defendant to fulfil his undertaking by the letter dated 10 February 2010 but the second defendant has failed and/or neglected to act in accordance with the said instruction.

(d) The first defendant has fulfilled his obligation to deposit the said stakeholder sum for the second defendant and has instructed the second defendant to release the said stakeholder sum to the plaintiff upon the conformity between him and the plaintiff.

(e) *The said stakeholder sum is for the benefit of the plaintiff and the second defendant ought to hold the said stakeholder sum as a trustee.* The second defendant has given his undertaking and he is accountable to release the said stakeholder sum to the plaintiff upon the instruction given by the first defendant. (Emphasis added.)

(f) The first defendant prays for the plaintiff's writ of summons and the statement of claim against the first defendant be dismissed with costs and claim against the second defendant to be allowed.

[3] By statement of defense dated 30 June 2011 (encl 9), *the second defendant* has pleaded, briefly and, inter alia, as follows:

(a) by the letter of appointment dated 19 January 2010 between the first defendant and the plaintiff, the plaintiff was required to complete the work within three months from the date of appointment ie on 19 April 2010;

(b) upon the appointment of the second defendant as a solicitor for the first

defendant, the second defendant at that material time was required to hold the said sum of RM495,000 as a stakeholder for the period of three months. Once the period of three months has lapsed, the said stakeholder sum is no longer a stakeholder sum but is a client's money;

(c) the second defendant denies that the letter of appointment was signed on 19 January 2010. The sum of RM200,000 was paid by the first defendant on 10 May 2010 through bank draft and was deposited with the second defendant's client's account on 11 May 2010;

(d) the second defendant did not receive the said sum from the first defendant on 19 January 2010. He received the said sum on 11 May 2010; and

(e) on 20 April 2011, the second defendant has issued a statutory claim under the Companies Act 1965 (Winding Up Notice) for the outstanding fees against the first defendant and the second defendant has executed the solicitors lien on the said sum upon the instruction of the plaintiff. This matter is already before the another High Court (Case No 24NCC-131 of 2011).

[4] On 27 June 2011, during the hearing of plaintiff's application for summary judgment (encl 5) against the defendants under O 14 of the Rules of the High Court ('RHC 1980'), all the parties had agreed that the summons in chambers (encl 5) be disposed of under O 14A of the RHC 1980, as the case involves construction of the letter of undertaking given by the second defendant to the plaintiff and questions of law.

[5] The agreed facts between all the parties, are as follows:

(a) pursuant to the first defendant's letter dated 19 January 2010 ('appointment letter'), the plaintiff had upon the first defendant's request, agreed to continue with the installation of liftswork under the project known as 'kerja-kerja Tambahan untuk Cadangan Pembangunan 10 Tingkat Kedai/ Pejabat/ Servis Apartment di atas Sebahagian Lot 9016 dan 9017, Mukim Batu, Kuala Lumpur untuk Fadason Holdings Sdn Bhd' ('the work');

(b) the terms of the letter of appointment are, inter alia:

(i) the consideration for the plaintiff to continue with the work for the first defendant is for the sum of RM695,000 ('contract sum');

(ii) RM200,000 of the contract sum will be paid to the plaintiff by the first defendant as initial payment upon execution and acceptance of the appointment letter by the plaintiff ('initial payment');

(iii) upon the plaintiff's acceptance of the appointment Letter, the first

defendant is to deposit the sum of RM495,000 of the balance of the contract sum with the second defendant, ie the solicitors appointed by the first defendant at that point of time, as a stakeholder ('stakeholder sum'). The second defendant shall thereupon issue to the plaintiff a letter of undertaking to release to the plaintiff, the said sum of RM495,000 only, upon the second defendant's receipt from the plaintiff of the relevant 'Perakuan Kelayakan' from 'Jabatan Keselamatan & Kesihatan Pekerjaan'; and

(iv) The completion period shall be three months upon the plaintiff receiving the initial payment of RM200,000 and the second defendant's letter of undertaking (which contents must be agreed by the plaintiff).

(c) pursuant to the appointment letter:

(i) the first defendant had paid the plaintiff the initial payment;

(ii) the second defendant had issued a letter of undertaking dated 10 February 2010 to the plaintiff stating that upon instructions from the first defendant, the second defendant undertakes to pay the plaintiff the stakeholder sum upon the following conditions:

(A) the stakeholder sum shall be forwarded to the plaintiff upon the first defendant's written instructions to the second defendant and upon the works undertaken by the plaintiff for the first defendant being completed to the satisfaction of the first defendant; and

(B) all terms and conditions as stated in the first defendant's appointment letter to the plaintiff dated 19 January 2010 is to be fulfilled

(iii) the first defendant had issued a letter dated 10 May 2010 to the second defendant with the following instructions:

(A) as the plaintiff required a new letter of undertaking the second defendant was instructed to issue a new letter of undertaking which incorporated the changes requested by the plaintiff as per the sample forwarded to the second defendant; and

(B) pursuant to the first defendant's appointment letter dated 19 January 2010, the first defendant forwarded banker's cheque No PBB 308896 dated 10 May 2010 to the second defendant for the amount of RM495,000 to be released to the plaintiff upon receipt from the first defendant the relevant 'Perakuan Kelayakan' from 'Jabatan Keselamatan & Kesihatan Pekerjaan'.

(iv) the second defendant had issued a new letter of undertaking dated 11 May 2010 to the plaintiff stating that pursuant to Item 2 (para 2) of the appointment letter dated 19 January 2010, the second defendant confirmed the following:

(A) *the second defendant was in receipt of the stakeholder sum*;

(B) *the second defendant undertakes to release the stakeholder sum upon the second defendant's receipt from the plaintiff the relevant 'Perakuan Kelayakan'* from 'Jabatan Keselamatan & Kesihatan Pekerjaan'. (Emphasis added.)

(d) *the first defendant had deposited with the second defendant the stakeholder sum on 11 May 2010.* (Emphasis added.)

(e) *the stakeholder sum of RM495,000 held in the client's account of the second defendant is held in trust for the plaintiff.* (Emphasis added.)

(f) *the first defendant and the first defendant's solicitors (Messrs Tajul Arafat & Associates) had on 18 April 2011 and on 11 May 2011 instructed the second defendant to release the stakeholder sum to the plaintiff.* (Emphasis added.)

(g) However, the second defendant has failed, refused and/or reluctant to release the stakeholder sum to the plaintiff despite demand being made by the plaintiff

(h) The plaintiff's claim toward the defendants is for the entire sum of RM495,000

[6] As agreed between the parties, *the questions of law framed under* O 14A of the RHC 1980 is, as follows:

(1) since the sum of RM495,000 which is held in the client's account of the second defendant ('the said money') is held in trust by the second defendant for the plaintiff, is the second defendant legally obliged to release the said money to the plaintiff upon instructions by the first defendant?

(2) whether the instructions given by the first defendant to the second defendant by letters on 18 April 2011 and 11 May 2011 to release the said money to the plaintiff is valid?

(3) as the said money is held in trust by the second defendant for the plaintiff, has the second defendant a lien on the said money and legally entitled not to release the said money to the plaintiff pending the determination of the second defendant's fees.

[7] Learned counsel for the plaintiff has submitted, inter alia, and briefly, is as follows:

(a) The answers to question 1 and 2 are in affirmative and the answer to question 3 is in negative, because:

(i) the second defendant is holding the stakeholder sum in trust for the plaintiff; and

(ii) the second defendant must release the stakeholder sum to the plaintiff.

(b) the second defendant has no lien or any right over the stakeholder sum as the monies belong to the plaintiff. The letter of undertaking did not state that the second defendant reserved any of his rights of lien;

(c) the plaintiff and the first defendant have agreed to waive the requirement of 'Perakuan Kelayakan' from 'Jabatan Kesihatan dan Keselamatan Pekerja' and the first defendant has instructed the second defendant to release the stakeholder sum immediately to the plaintiff;

(d) the solicitor's right of lien under r 17 of the Solicitors' Account Rules 1990 is only exercisable on client's money but not on trust money. The stakeholder sum does not belong to the first defendant. The second defendant is holding the *stakeholder sum in trust for the plaintiff* and hence belongs to the plaintiff absolutely. (Emphasis added.)

(e) hence, the plaintiff prays for order in terms of the summons in chambers (encl 5).

[8] In support of the plaintiff's case, learned counsel for the plaintiff has referred to the following cases:

(a) *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116; [1987] CLJ (Rep) 400 (SC);

(b) *Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794; [2009] 1 CLJ 872 (FC);

(c) *Rockeagle Ltd v Alsop Wilkinson (a firm)* [1992] Ch 47.

[9] Learned counsel for the first defendant has submitted, inter alia, and briefly, is as follows:

(a) the second defendant was in a fiduciary position. The second defendant owed, fiduciary obligations with respect to the letter of undertaking and the cheque issued for the said stakeholder sum by the first defendant in favour of the second defendant *is for the benefit of the plaintiff*; (Emphasis added.)

(b) by the second defendant's letter dated 11 May 2010, it cannot be denied that the second defendant was the stakeholder in the transaction and duly authorised *to forward the said sum to the plaintiff upon procuring instructions from the first defendant*; (Emphasis added.)

(c) *the second defendant* has breached the undertaking given to the plaintiff and is therefore liable to release the stakeholder sum to the plaintiff; and (Emphasis added.)

(d) the first defendant prays for an order in terms against the second defendant and the first defendant to be discharged of its liability.

[10] In support of the first defendant's argument, learned counsel for the first defendant has referred to the following cases:

(a) *Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor; Dato' Au Development Sdn Bhd v Malayan United Finance Bhd & Anor* [1989] 3 MLJ 434; [1989] 1 CLJ (Rep) 460

(b) *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116; [1987] CLJ (Rep) 400(SC)

[11] Learned counsel for the second defendant has submitted, inter alia, and briefly, is as follows:

(a) the first letter of undertaking dated 10 February 2010 by the second defendant to the plaintiff is not binding upon the second defendant as the plaintiff had informed the first defendant vide the said letter, that the second defendant's letter of undertaking was:

(i) not in accordance with the terms as stipulated in the terms of the letter of award; and

(ii) a revised letter of undertaking as per attached (as drafted by the plaintiff) is required from the second defendant.

(b) Pursuant to the plaintiff's instructions vide the plaintiff's letter dated 5 March 2010, the first defendant had instructed the second defendant vide its letter dated 10 May 2010 to issue a new letter of undertaking to reflect the changes requested by the plaintiff. The first defendant had also forwarded the said stakeholder sum stipulating that the said sum was to be released only upon receipt of the relevant 'Perakuan Kelayakan' from Jabatan Kesihatan Keselamatan Pekerja.

(c) The second defendant had held monies to the credit of the client in the second defendant's client account, ie for the benefit of only the first defendant. Therefore, the stakeholder sum is deemed to be client's monies and hence capable of being subjected to the second defendants' solicitors lien.

(d) The letter of instruction dated 11 May 2011 from the first defendant to the second defendant has no effect as the second defendant had already put the first defendant to notice that the second defendant is exercising his solicitors lien pursuant to the said r 17, on 20 April 2011.

(e) *The second defendant is also equally entitled not to release the stakeholder sum to the plaintiff, especially pending the determination of the second defendant's fees.* (Emphasis added.)

(f) The second defendant prays that the plaintiff's claim be dismissed with costs.

[12] In support of the second defendant's case, learned counsel for the second defendant has referred to the following cases:

(a) *Madam Packiam Ramalingam v Badan Peguam Malaysia* [2000] 1 MLJ 151; [1999] Part 7 Case 12 (HCM)

(b) *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116; [1987] CLJ (Rep) 400(SC)

(c) *Vije & Co v Co-Operative Central Bank Ltd* [1991] 3 MLJ 432; [1991] 4 CLJ (Rep) 188

(d) *Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794; [2009] 1 CLJ 872 (FC)

DECISION

[13] In order to decide the three questions of law as agreed by the parties, and for the purpose of the summons in chambers (encl 5), this court has considered the following cause papers with the submissions:

(a) the plaintiff's writ of summons and the statement of claim (encls 1 and 2);

(b) the statement of defence of the first and second defendant (encls 8 and 9);

(c) common agreed bundle of documents (the existence and contents have been agreed by all the parties);

(d) the summons in chambers (encl 5) with the supporting affidavit of the plaintiff (encl 6) and the *affidavit jawapan* of all the parties (encls 8 and 11);

(e) statement of agreed facts between all the parties (encl c);

(f) the list of questions of law (encl a);

(g) submissions with the authorities of all the parties.

[14] As to the chronology of events filed by both the parties, it is not evidence or part of the materials to be relied on for the purpose of the summons in chambers (encl 5) under O 14 or under O 14A of the RHC 1980 and is not considered by this court for the determination of the three questions of law.

BRIEF BACKGROUND FACTS

[15] On 27 June 2011, during the case management, with the agreement of all the parties, this court had directed the case to be determined under O 14A of the Rules of the High Court 1980 where the questions of law as included in this judgment was framed.

[16] On 12 August 2011 upon being satisfied that all the directions of the court including the filing of the affidavits have been completed by the parties, this court had instructed the counsels for the plaintiff and the defendants to file skeletal submissions with the authorities and subject to the plaintiff's solicitors refilling the common bundle of documents on or before 18 August 2011 to be referred *SOLELY* for the determination of the questions of law under O 14A of the RHC 1980. In the mean time, the plaintiff had on 22 June 2011 filed an application (encl 5) for summary judgment under O 14 of the RHC 1980 against both the defendants. Accordingly, and with the agreement of the parties, this court had directed that the summons in chambers (encl 5) be determined and the plaintiff's claim as per the statement of claim be disposed of by deciding the questions of law under O 14A of the RHC 1980. This court had also ordered the outline submissions on the questions of law to be filed on or before 15 September 2011 to the summons in chambers (encl 5) and fixed 30 September 2011, for clarification and if possible, the decision. However, as the first defendant's solicitors had subsequently applied for an adjournment of the case on 30 September 2011 as he was leaving for India, this court had fixed a new date for clarification on 10 October 2011.

[17] On 10 October 2011, learned counsel for the plaintiff had handed to this court a copy of the letter dated 19 September 2011 addressed to the second defendant's solicitors with the copy of the 'Perakuan Kelayakan' dated 12 September 2011. All the parties had confirmed having received a copy of the same. As the court cannot consider materials or evidence outside the affidavits filed by the parties for the summons in chambers (encl 5), this court had granted the plaintiff's solicitors the liberty to file a further affidavit enclosing the copy of the 'Perakuan Kelayakan' and directed the same to be served on the first and second defendants' solicitors. The first and second defendant were also given the opportunity and liberty to reply and ordered the parties to limit the filing of the further affidavit and the reply to the 'Perakuan Kelayakan' and to

be filed on or before 27 October 2011. All the parties were also granted the liberty to file any further outline submissions and directed the submissions to be limited to the 'Perakuan Kelayakan' and the same to be filed on or before 31 October 2011. This court then fixed the decision on 29 November 2011.

[18] However, when the case was called up on 29 November 2011, this court had discovered that the parties, in particular, the second defendant and the plaintiff did not comply with the direction of the court but had filed eight further affidavits, three affidavits by the plaintiff and four affidavits by the second defendant and there was one affidavit by the first defendant which was done on their own volition without any leave having been obtained from this court or any direction by this court. Despite the fact that the pleadings have been closed and the parties had finalised exchange of affidavits, skeletal submissions having been filed, and the court having heard further oral submissions on 10 October 2011, and a date having been fixed on 29 November 2011 for clarification and if possible, decision, the solicitors for the parties in total disregard to the directions of this court given on 10 October 2011 to confine any further affidavit or reply to the 'Perakuan Kelayakan', the solicitor's for the second defendant and the plaintiff had violated the directions of the court and continued to file affidavits until 25 November 2011. In the circumstances, this court had ordered all the eight affidavits that was filed after the submissions have been completed and without the leave of the court to be expunged from the court's record and disregarded the same. In any event and in all fairness to the parties, this court had directed the parties to file fresh affidavit, the plaintiff to file one supplementary affidavit with a copy of the 'Perakuan Kelayakan' and the first and second defendant were given the liberty to file the affidavit in reply in respect of the 'Perakuan Kelayakan'.

DECISION

[19] On going through the summons in chambers (encl 5), the afidavit in support of the plaintiff (encl 6), the *afidavit jawapan* of the second defendant (encl 10), *afidavit jawapan* of the first defendant (encl 11), list of the questions of law dated 12 august 2011 (encl a), *ikatan dokumen bersama (kandungan dan kewujudan diakui oleh ketiga-tiga pihak*) dated 15 August 2011 (encl b), statement of agreed facts dated 12 August 2011 (encl c), plaintiff's written submissions with the authorities (encl d), the first defendant's submissions with the authorities (encl e), the second defendant's submissions with the authorities (encl f), the plaintiff's reply (encl g), the second defendant's reply (encl h) and the second defendant submissions on 'Sijil Perakuan Kelayakan' (encl i), and the research carried out by this court, the decision of this court is:

(a) on the facts and the surrounding circumstances of the case, this court finds that the stakeholder sum of RM495,000 in the possession of the second defendant was deposited by the first defendant for the benefit of

the plaintiff and was to be held by the second defendant as stakeholder sum in trust for the plaintiff as instructed by the first defendant and as agreed by all the parties;

(b) as the stakeholder sum of RM495,000 is held in trust by the second defendant for the benefit of the plaintiff, the second defendant is legally obliged to release the said sum to the plaintiff upon instructions given by the first defendant. The second defendant has no business to enter into the dispute or disagreement or compromise or variation of the agreement in respect of the works and the terms of the payment of the contract of works which is a matter entirely between the first defendant and the plaintiff. The payment to the plaintiff by the first defendant is for the works carried out by the plaintiff for the first defendant for which the sum of RM495,000 has been deposited with the second defendant to be released to the plaintiff when instructed by the first defendant. As long as the second defendant is instructed by the first defendant to release the stakeholder sum of RM495,000 which is held in trust and for the benefit of the plaintiff, for the works carried out by the plaintiff for the first defendant, the second defendant is duty bound to release the said sum to the plaintiff; and

(c) the second defendant who has given the undertaking to the plaintiff to hold the stakeholder sum of RM495,000 in trust for the plaintiff is not permitted to resile from the undertaking by raising collateral issues with the view to delay or deny the plaintiff of the right and entitlement of the stakeholder sum of RM495,000.

[20] This court finds that the second defendant's contention and reasons for not releasing the stakeholder sum of RM495,000 to the plaintiff is too vague, inconsistent and contrary to the undertaking he had given to the plaintiff. This court finds that:

(a) first, the second defendant's contention that the stakeholder sum of RM495,000 cannot be released to the plaintiff because the 'Perakuan Kelayakan' has not been received by the first defendant from the *Jabatan Keselamatan dan Kesihatan Pekerjaan* pursuant to the letter of undertaking dated 11 May 2010 is against the weight of the evidence. The first defendant and the plaintiff had agreed that the stakeholder sum be released to the plaintiff on the plaintiff's undertaking to obtain the 'Perakuan Kelayakan'. Accordingly, the first defendant has given instruction to the second defendant to release the stakeholder sum to the plaintiff and any variation as to when the stakeholder sum is to be paid to the plaintiff is a matter entirely to be agreed between the first defendant and the plaintiff. On the facts in the present case, the second defendant cannot dictate his own terms to the parties and contrary to his undertaking;

(b) secondly, the second defendant's contention that the stakeholder sum is deemed to be client's money and is capable or being subjected to the second defendant solicitor's lien pursuant to r 17 of the Solicitors Account Rule 1990 is an afterthought defence, and on the facts in the present case, it has no basis in law and in fact;

(c) thirdly, when the plaintiff and the first defendant had agreed that the plaintiff be paid the stakeholder sum of RM495,000 based on the agreement between the plaintiff and the first defendant and on the undertaking given by the plaintiff to the first defendant to produce the 'Perakuan Kelayakan', the second defendant, has changed his earlier reason and objection and has contended that there is a conspiracy between the plaintiff and the first defendant when the first defendant had instructed the second defendant to release the stakeholder sum being RM495,000 to the plaintiff. A conspiracy is an agreement between two or more persons to effect an unlawful purpose which results in damages to somebody, (per Viscount Simon LC in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] 1 All ER 142 at p 147). On the facts of the present case, there is no issue of any conspiracy and it is an afterthought contention of the second defendant to deny the plaintiff of the entitlement of the stakeholder sum;

(d) this court also finds that the second defendant cannot possibly and unilaterally impose or include a new set of terms and conditions to the said letter of undertaking which was not intended or instructed by the first defendant. There is no evidence to support the allegation of conspiracy between the first defendant and the plaintiff and it is a serious accusation by the second defendant without any basis;

(e) the second defendant could not assert facts that would contradict its earlier undertaking to release the stakeholder sum to the plaintiff as that would be inequitable and unjust. The second defendant had full knowledge that the stakeholder sum is lawfully due to the plaintiff and he must be willing and prepared to release the said sum of RM495,000 to the plaintiff upon the instruction of the first defendant or their solicitors or he must be prepared to face the legal consequences of his conduct and breach of his undertaking in another forum for unilaterally converting the trust money as client's money for his own benefit. It is important to maintain the concept of the trust and not to allow the second defendant, especially when he is a member of the legal professional to strain the undertaking given by him by asserting facts which is unreasonable and beyond what the parties had intended.

In *Nasir Kenzin & Tan v Elegant Group Sdn Bhd* [2008] MLJU 664; [2009] 1 CLJ 47, the Court of Appeal said at pp 54–55 (CLJ):

> A scrutiny of the letter showed it as an irrevocable undertaking. But what is an undertaking? *Black's Law Dictionary* defines it as follows:

> *Undertaking*. A promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other. It does not necessarily imply a consideration. In a somewhat special sense, a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposite party. A promise or security in any form.

A promise from this same dictionary is defined as follows:

> *Promise.* A declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act, and which gives to the person to whom made a right to expect or claim the performance of some particular thing. A declaration, verbal or written, made by one person to another for a good or valuable consideration, in the nature of a covenant by which the promisor binds himself to do or forebear some act, and gives to the promise a legal right to demand and enforce a fulfilment.
>
> An express undertaking, or agreement to carry a purpose into effect … An undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future.
>
> A promise is a manifesto of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made. A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct …

What can be gauged from the above comprehensive definition is that, for purposes of this appeal, the impugned undertaking is a promise or security given in the course of the arrangement, which binds the appellant in law, for obtaining some concession from the respondent. All the respondent had to do was hand over RM1 million to the appellant as stakeholder's money of which they did. The promise required of the appellant was the return of that stakeholder sum to the respondent, in the event something shall happen, or that something shall not happen, leading to the abortion or termination of the transaction of buying the shares of the company.

(f) As a solicitor, the second defendant must be cautious when accusing the plaintiff and the first defendant of a serious offence, to wit, conspiracy by bare assertion, (see *Gasing Heights Sdn Bhd v Aloyah bte Abdul Rahman* [1996] 3 MLJ 259 at p 269). The second defendant must recognise the principles of equity that where he has received the trust money with the express notice of the trust, he is, in equity, in the position of an express trustee and he is not entitled to benefit or take benefit on the trust money. Justice and good conscience requires that the court look at the circumstances of each case to decide in what way the equity is satisfied. The second defendant cannot conscientiously and unilaterally keep the stakeholder money for himself when justice and good conscience require

the second defendant to release the money to the plaintiff. It is not for the second defendant to dictate to the plaintiff or to the first defendant or to unilaterally impose condition or conditions and in what manner and when he will release the stakeholder sum to the plaintiff; and

(g) fourthly, when the 'Perakuan Kelayakan' was in fact produced to the second defendant who had earlier insisted for the production of the 'Perakuan Kelayakan' as contained in the letter of undertaking dated 11 May 2010, the second defendant had changed his stand and instead had contended that the 'Perakuan Kelayakan' is forwarded to the second defendant to frustrate the second defendant's lawful exercise of his solicitor's lien on the stakeholder sum pending the determination of the second defendant's fees which is an afterthought assertion, (see also para 5 line 7–9 and para 9 of the second defendant's statement of defense (encl 9).

[21] This court regrets to note that learned counsel for the second defendant has raised matters in his submissions, particularly, No 25 to No 28 at pp 9–10 (encl F), which are outside the evidence and the documents that are admissible and relied on for this court to determine only the three questions of law and to arrive at a just decision. The second defendant is not permitted to approbate or reprobate and he is also estopped from denying his obligations or to resile from the undertaking he had given to the plaintiff, (see s 115 of the Evidence Act 1950, *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 344, *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 3 WLR 565, *Koh Yen Bee v American International Assurance Co Ltd* [2000] 7 MLJ 278; [2000] 3 CLJ 28).

[22] Where the stakeholder sum which has been deposited with a solicitor, in the present case, the second defendant is to be held in trust for the plaintiff and to be released on the instruction of the first defendant and the stakeholder sum was accepted in such circumstances, the second defendant cannot in good conscience manoeuvre to retain or unilaterally convert the beneficial interest to himself as purportedly having a lien as equity does not permit him to resile from the trust and the undertaking given by him.

In *Dawson Bank v Nippon Menkwa Kabushiiki Kaisha* LR 62 IA 100, Lord Russel of Killowen said at p 108:

Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing the cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action or (to put in it another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action (see *Sarat Chundar Day v Gopal Chundar Laha* LR 19 IA 203).

'a party who executes a deed is estopped in a court of law from saying that the facts stated in the deed are not truly stated' (see *Baker v Dewey* (1823) 1 BNC 704, *Public Textiles Bhd v Lembaga Letrik Negara* [1976] 2 MLJ 58 at p 60, *Fu Loong Lithographer Pte Ltd v Mun Hean Realty Pte Ltd* [1989] 2 MLJ 80 at p 84, *Ho Weng Liong v Ng Kee Chin* [1996] 5 MLJ 139 at p 151–152).

[23] As to the contention of abuse, if at all there is any abuse as submitted in para 7 of the second defendant's submissions dated 1 November 2011, it is the second defendant, with respect, who has abused the process of the court by raising collateral matters which flies on the face of the letter of undertaking and in total disregard to the undertaking he had given to the plaintiff and not the plaintiff. The second defendant, who is an Advocate and Solicitor of the High Court of Malaya, is bound to assist this court to arrive at a just decision as his paramount duty is to the court and not towards his commercial interest and he is to ensure that the process of the court is not abused by raising extraneous matters which was not within the contemplation of the parties when the stakeholder money was deposited with the second defendant and it must be based on the term of his undertaking, (see O 92 r 4 of the RHC 1980).

[24] Mere assertion by the second defendant that he is entitled to have a lien on the stakeholder sum is insufficient to render the stakeholder sum which rightfully belongs to the plaintiff and is held in trust for the plaintiff to be unilaterally converted as client's money in order to escape or circumvent the obligation or his undertaking given to the plaintiff. In accordance with the demands of justice and good conscience, the second defendant is legally bound to release the stakeholder sum to the plaintiff. Accordingly, the plaintiff is entitled to recover the said sum of RM495,000 deposited with the second defendant as the trust money for the plaintiff and this is confirmed by the first defendant. The second defendant cannot retain or unilaterally convert possession of the stakeholder sum for his private use towards his solicitor's lien (see also *Peninsular Concord Sdn Bhd v Datuk M Kayveas & Anor (both practicing as advocate and solicitor under the name and style of Messrs Blanche Kayveas & Co)* [2011] 2 MLJ 534; [2011] 7 CLJ 978, HC, *Moloney v Hardy* (1970) 216 EG 1582, *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116, *Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794, *Rock Eajle Ltd v Alsop Wilkinson* [1991] Ch 47, *Dato' Seri Au Ba Chi & Anor v Malayan United Finance Bhd & Anor* [1989] 1 CLJ (Rep) 460).

[25] On the facts of the present case, this court is unable to find in the letter of undertaking given by the second defendant to justify the conclusion that the stakeholder sum was intended for the second defendant to have the lien. It is also not correct or proper to import into the letter of undertaking of a solicitor's lien on the stakeholder sum when the parties intention and terms at all material

times was for the second defendant to hold the stakeholder's sum and trust for the plaintiff. The second defendant by giving his letter of undertaking has led the plaintiff to believe that he will release the said sum of RM495,000 to the plaintiff and it was an enforceable undertaking and this court must give effect to the same.

In *Toh Theam Hock v Kemajuan Perwira Management Corpn. Sdn Bhd* [1988] 1 MLJ 116 Hashim Yeop Sani SCJ said at p 118:

What is in essence stakeholding? The word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held. (see also *Peninsular Concorde Sdn Bhd v Dato' M Kayveas & Anor* [2011] 7 CLJ 978.)

[26] The second defendant has given an undertaking to the plaintiff; that the stakeholder sum, being RM495,000 was deposited with the second defendant by the first defendant, and that it is solely to pay for the benefit of the plaintiff as instructed by the first defendant. Indeed, the first defendant has instructed the second defendant to release the stakeholder sum of RM495,000 to the plaintiff. As instructed by the first defendant, the second defendant is legally duty bound to release the said sum of RM495,000 to the plaintiff. Regrettably, the second defendant has failed to comply with his undertaking despite the instruction given by the first defendant. Consequently, the second defendant is in breach of his undertaking for which is liable to face the legal consequences, especially so, when he is an Advocate and Solicitor of the High Court of Malaya.

[27] This court is satisfied that the first defendant did not intend to hand to the second defendant the said sum of RM495,000 and to keep the stakeholder money or even impliedly for the second defendant's use or to have a solicitor's lien as the money is a trust money and rightfully belong to the plaintiff. The assurance and undertaking given by the second defendant to the plaintiff has to be honoured and it cannot be reversed or converted unilaterally by the second defendant. The stakeholder sum of RM495,000 was deposited by the first defendant with the second defendant as stakeholder money and to be held in trust and for the benefit of the plaintiff for the works carried out for the first defendant. The second defendant, therefore, cannot himself regard the stakeholder sum as client's money and unilaterally assume that he has a lien on the said sum.

Those who know that a stakeholder sum is trust money cannot take possession of that trust money for their own private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment of the money (see *Foxton v Manchester and Liverpool District Banking Co* (1881) 44 LT 406 at p 408).

[28] This court wishes to reiterate that the stakeholder sum being RM495,000 is held in trust for the benefit of the plaintiff. Accordingly, it is to be applied only for the special purpose as agreed and is payable to the plaintiff. In the present case, the stakeholder sum is to be utilised for that special purpose and as instructed by the first defendant. Based on the letter of undertaking given by the second defendant to the plaintiff with the consent of the first defendant, he ought to release the stake holder sum to the plaintiff. The second defendant cannot conscientiously retain the stakeholders' money which is trust money against the wishes and instructions of the first defendant. He cannot misapply the said stakeholder sum for any other purpose, knowingly that that money is held in trust for the benefit of the plaintiff.

[29] On the facts and the surrounding circumstances of this case, this court finds that the stakeholder sum held by the second defendant is not or deemed to be subject to the solicitors lien on the basis that there is money owing as fees by the first defendant to him. The dispute, if there is any as to the alleged fees owing to the second defendant by the first defendant, is a matter entirely between the first defendant and the second defendant and has nothing whatsoever to do with the plaintiff who is legally entitled to the stakeholder sum for the work carried out for the first defendant and it is confirmed by the first defendant. The second defendant cannot and contrary to his undertaking given to the plaintiff and dispute the instructions given by the first defendant and continue to withhold the said sum pending solicitor's lien. Indeed, there is nothing in the letter of undertaking that the stakeholder sum will be subject to a solicitor's lien as between the first defendant and the second defendant which is certainly an afterthought and a bare assertion to deny the plaintiff's claim of the sum of RM495,000.

[30] This court is of the considered view that this is a clear case for the second defendant to release the said stakeholder sum to the plaintiff without any further delay. It is inequitable on the ground of justice and good conscious that the second defendant should be permitted to take the trust money of the plaintiff and unilaterally convert the same as client's money for the second defendant to have a lien over fees to an unrelated matter allegedly owing by the first defendant. When a solicitor receives a trust money with the express notice of the trust, he is, in equity, as in the present case, and coupled with his undertaking, in the position of an express trustee (see *In Re Dickson* [1990] 2 Ch 561). Therefore, it is the duty of this court to enforce the obligation as provided in the letter of undertaking by the second defendant unless it can be shown that the payment of the stakeholder sum to the plaintiff would be purely contrary to the real justice of the case which is not the case:

In *Combe v Combe* [1951] 2 KB 215 the court said at p 220:

where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterword be allowed to revert the previous legal relation as if no such promise or assurance were been made by him but he, must accept their legal relations subject to such qualification which he himself as so introduce even though it is no supported in point of law on any consideration but only by his words is another words, the second defendant is estopped from exerting that their solicitors lien on the stakeholder sum which is baseless without any foundation and ought to be dismissed in limini.

a. The second defendant *has no right*:

   i. first, to convert the stakeholder sum, meaning the first defendant's money which is trust money for the plaintiff as client's money to circumvent his said undertaking to release the stakeholder sum to the plaintiff;

   ii. secondly, the second defendant is not obliged to pay the stakeholder sum of RM495,000 into the client's account which is meant for payment to the plaintiff for the works done for the first defendant. The second defendant could have opened a separate bank account in the plaintiff's name and pay the money in a fixed deposit account;

   iii. thirdly, the plaintiff who is the beneficiary to the stakeholder sum is not the second defendant's client. Rule 2 of the Solicitors Account Rule 1990 defines 'client' as means a person on whose account a solicitor holds or received client's money.

   iv. fourthly, The fact that the stakeholder sum to which the plaintiff is the beneficiary is paid into the client's account does not automatically give a right to the second defendant to a lien. In other words, the fact the stakeholder sum which is held in trust for the plaintiff with the knowledge that the stakeholder sum is for the plaintiff does not entitled the second defendant to a lien on the client's money. In any event, the stakeholder sum held by the second defendant is money held for the plaintiff and it is not money due to the client or to the first defendant

[31] In the circumstances and based on the totality of the evidence produced before this court and in the light of the facts and the surrounding circumstances and the case law, the decision of this court in respect of the three questions of law, is as follows:

a. Question 1: Affirmative,

b. Question 2: Affirmative,

c. Question 3: Negative as the money is held in trust for the plaintiff by the

second defendant. The second defendant is obliged to release the stakeholder sum to the plaintiff as it is for the plaintiff.

[32] Accordingly, and based on the legal principles to enter summary judgment under O 14A of the RHC 1980, this court finds there is no triable issue or issues for this case to proceed to trial, (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). Further, the parties have also agreed that the summons in chambers (encl 5) and the plaintiff's claim is to be disposed of under O 14A of the RHC 1980.

[33] As for the first defendant, there is a valid defence recognised in law to oppose the plaintiff's claim against the first defendant. Therefore, the first defendant is absolved from liability to the plaintiff as the first defendant has already deposited the money owing to the plaintiff with the second defendant for payment to the plaintiff and it is clearly reflected in the said letter of undertaking given by the second defendant. Therefore, the summons in chambers (encl 5) ought to be dismissed against the first defendant.

[34] Having considered all the circumstances of the case, this court finds that the justice of the case lies in favour of the plaintiff and good conscience will bind the second defendant on his letter of undertaking. In accordance with the rules of reasons and justice, the summons in chambers (encl 5), prayer (1) and (2) is allowed. Judgment is entered against the second defendant. However, under prayer 4, and on the factual matrix and the justice of the case and having taken into account that the stakeholder sum which is lawfully due and payable to the plaintiff has been unreasonably retained by the second defendant, it is appropriate to order the second defendant under *'Lain-lain relif dan/atau relif selanjutnya Mahkamah yang mulia ini anggap suai manfaat'* being prayer 4 to order the second defendant as a consequential order to release the stakeholder sum to the plaintiff within five days from the date of the order.

In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, the Federal Court said at p 160:

'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning.

[35] Accordingly, the second defendant is ordered to pay the said sum of RM495,000 to the plaintiff within five days from the date of this order on or before 21 December 2011 (see also the inherent jurisdiction provided under O 92 r 4 of the RHC 1980, *Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 445). As for the costs of this summons in

chambers under prayer 3, the second defendant is ordered to pay to the plaintiff the sum of RM12,000 as costs. The summons in chambers (encl 5) is dismissed against the first defendant.

Second defendant ordered to pay stakeholder sum to plaintiff.

Reported by Kanesh Sundrum